Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-9171

RICHARD W. HOSTROP,

Petitioner,

vs.

BOARD OF JUNIOR COLLEGE DISTRICT NO. 515, COUNTIES OF COOK AND WILL AND STATE OF ILLINOIS, a body politic and corporate, and JAMES GRIFFITH, ANTHONY HANNAGAN, DORIS HILL, WILLIAM JACKSON, LESTER KLOSS, SHIRLEY MELLECKER and THOMAS PORTER, individually and as members of the Board of Trustees,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Justices of the Supreme Court of the United States:

Petitioner, Richard W. Hostrop, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, reversing in part the decision of the United States District Court for the Northern District of Illinois.

Petitioner brought this suit, alleging violation of his constitutional rights and breach of contract as a result of the termination of his employment as President of Prairie State College under a written employment agreement. After a bench trial, the District Court rendered judgment for respondents. On appeal, the Court of Appeals, affirmed the finding in favor of respondents on the breach of contract issue, reversed the finding in favor of respondents on the issue of violation of petitioner's constitutional rights to due process, as to the defendant Board as an entity only, and remanded with directions to hold a hearing on the issue of damages. Damages, however, were limited to those "damages fairly attributable to the failure to afford plaintiff the due process hearing to which he was entitled," but which were specifically held not to include wages to which he would have been entitled under his employment agreement.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is as yet unreported, and is reproduced as Appendix "A" to this Petition. The opinion of the District Court is unreported, and is reproduced as Appendix "B" to this Petition.

When this cause was first filed, the District Court dismissed the complaint for failure to state a claim upon which relief can be granted. That opinion, which is unreported, is reproduced as Appendix "C" to this Petition. That decision was reversed by the United States Court of Appeals for the Seventh Circuit in a prior opinion, reported at 471 F.2d 488 (1972). That opinion is reproduced as Appendix "D" to this Petition.

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit was handed down on September 24, 1975. Petitions for rehearing were filed by both parties. Those petitions were denied on October 30, 1975. A copy of the order denying those Petitions is reproduced as Appendix "E" to this Petition. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether an employee of a State agency whose constitutional rights to due process have been violated by refusing to grant him a hearing may be foreclosed from recovering damages based upon the salary due him under a written employment contract.

2. Whether a State employee's rights to freedom of speech may be denied to him under the guise that it is the manner in which the speech is communicated, rather than the content, which is being punished.

STATEMENT OF THE CASE

In the spring of 1967, Petitioner, Richard Hostrop, was hired by the Board of Junior College District No. 515, as President of Prairie State College, pursuant to a written contract, which extended through June 30, 1968. A new contract was subsequently entered into on April 10, 1969, extending through June 30, 1971. On April 2, 1970, that contract was extended, and a new written agreement signed, extending through June 30, 1972. On July 23, 1970, without the presence of Plaintiff, the Board, comprised of the individuals defendants herein, voted unanimously to terminate Plaintiff's employment, effective immediately.

No hearing was ever held, despite Plaintiff's demand for such a hearing. This suit was commenced in January, 1971. The suit alleged two grounds of violation of his constitutional rights: 1) discharge for proper exercise of his First Amendment Rights in writing a memorandum to other members of his administration discussing certain proposed changes in the college's ethnic studies memorandum; 2) violation of his rights to due process by failure to give him a notice of charges or a hearing in connection with his discharge. The District Court dismissed the suit for failure to state a claim upon which relief can be granted.

On appeal the United States Court of Appeals for the Seventh Circuit reversed and remanded for a trial. In so doing, the court found that dismissal of plaintiff for the writing of the memorandum discussing the ethnic studies program of the college could not be a legitimate ground for discharge unless the defendants were able to prove that

the writing of this memorandum constituted "a serious impairment of the effectiveness of the working relationship between him and the Board."

The Court also found that the complaint had alleged at least two additional protected interests upon which defendants had infringed: 1) a deprivation of "liberty" by charging him with misrepresentations, supplying false information and withholding other information; and 2) a deprivation of "property" in the form of his employment contract. As a result of the existence of these interests, the Court held that plaintiff was entitled to "be given a notice of the charges against him, notice of the evidence upon which the charges will be based, a hearing before a tribunal possessing apparent impartiality, and a chance to present witnesses and confront adverse evidence at the hearing."

Upon remand, the plaintiff was given leave to amend his complaint to add an additional count to his complaint alleging breach of his written employment contract by defendants.

A bench trial was held by the District Court. The District Court ultimately handed down a written opinion, in which it was found that plaintiff had not demonstrated the existence of either a "liberty" or "property" right, and therefore was not entitled to a pretermination hearing.

The District Court also found that the Board was prepared to grant plaintiff an informal impartial hearing, but that plaintiff had waived his rights to such hearing by refusing to appear at the Board meeting at which the Board terminated his employment. In addition, the District Court held that Plaintiff's "termination was fully justified and was the culmination of a series of confrontations

and incidents" which "substantially impeded the Board's normal functions, critically impaired the personal working relationship between the parties, and completely destroyed the Board's confidence in Plaintiff's loyalty and abilities."

This finding was reversed by the Court of Appeals, which held that Plaintiff "was never offered a fair hearing on termination, and, that, in fact, the board prejudged his case before making any hearing available to him," thus, "being no longer therefore 'a tribunal possessing apparent impartiality,'" as required by the Court of Appeals' first decision in this case.

In discussing the relief available to plaintiff for the violation of his due process rights, the Court of Appeals held that the Board, as an entity, was amenable to suit under 28 U.S.C. §1331. Relying upon this Court's decision in *Wood* v. *Strickland*, 95 S.Ct. 992 (1975), the Court, however, held that the individual Board members were not liable for the deprivation of plaintiff's rights. The Court based this holding upon the finding that there was no evidence that they had acted maliciously, that the defendants had not terminated plaintiff for exercising his first amendment rights, and finally, because in 1970, when the action took place, there was no reason for the individual members to know that plaintiff was entitled to a hearing prior to his termination.

The Court of Appeals therefore, reversed with directions to hold a hearing on damages. The range of damages permitted by the Court, however, was extremely limited. Based upon the finding of the District Court that plaintiff had been terminated for cause by defendants, the Court of Appeals found that "it is inconceivable that even

if plaintiff had been accorded his procedural due process rights he would have been allowed to continue in office." Continuing from this premise, the Court held that "justice would not be served and plaintiff would be given a windfall at the expense of the taxpayers of the school district if we were to hold that he is entitled to the same damages that would be recoverable if the contract had been terminated without just cause." The Court also rejected the idea of reimbursement under the contract until the time of the adjudication of the constitution deprivation on the ground that the amount of recovery would be "wholly fortuitous since it would be dependent upon when the District Court could hear the case, and which would encourage dilatory tactics."

The Court held that the proper measure of damages is to be those damages attributable to "the deprivation of his procedural due process right to notice and a hearing," specifically denominating them "damages for the deprivation of intangible rights for which no pecuniary loss can be shown." The only guidelines given to be considered on remand were: the nature of the constitutional deprivation and the magnitude of the mental distress and humiliation suffered by the plaintiff, as well as any other injury caused as a result of being deprived of federally protected rights, but not . . . attorneys' fees."

REASONS FOR GRANTING THE WRIT

I.

PLAINTIFF HAS BEEN DENIED HIS RIGHT TO DUE PROCESS BY LIMITING HIS DAMAGES TO DEPRIVE HIM OF PAYMENTS DUE UNDER AN EMPLOYMENT AGREEMENT.

While the Court of Appeals has found that Plaintiff's procedural due process rights have been violated, at the very same time it has stripped those rights of all meaningful content. This Court recently has considered several cases dealing with the substantive rights of due process of those subject to the control of State action. None of those cases, however, has presented the issue presented here: the correct measure of damages to be applied in a proper vindication of those rights. This case presents that issue in a uniquely appropriate context. A review of those cases which have considered that issue makes it obvious that confusion and conflict is starting to build among the various circuits. Unless this Court sets forth some definitive guidelines, that confusion will continue to proliferate. Constitutional rights will mean different things to different persons in different geographical locations. Where the constitutional rights are constant nationwide, the means by which deprivation of these rights are to be compensated must also be constant.

It is respectfully submitted that the decision by the Court of Appeals for the Seventh Circuit in this case takes a backward step in the clear course charted by this Court regarding Constitutional rights. While recognizing plaintiff's rights to due process, the measure of damages set forth by the Court of Appeals goes a long way toward depriving those rights of any actual content. It also misconstrues the import of those rights.

The touchstone of decision in cases of this nature was set forth by this Court in the companion cases, *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701 (1972) and *Perry* v. *Sinderman*, 408 U.S. 593, 92 S.Ct. 2694 (1974). The nature of the interests protected by the due process clause were described thusly by this Court:

> "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. Those interests—property interests—may take many forms." *Board of Regents* v. *Roth, Id.* at 576, 92 S.Ct. at 2708.
>
> ". . . 'property' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.'" *Perry* v. *Sinderman*, 408 U.S. at 601, 92 S.Ct. at 1699.

The reason for due process protection of property rights is obvious: such a protected interest may be taken from an individual only in certain situations, and then, only in a proper manner. This, too, was made explicit by this Court in *Roth*:

> "Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing 'except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' *Boddie* v. *Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed. 2d 113. 'While [m]any controversies have

> raged about . . . the Due Process Clause, . . . it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate [a protected] interest . . . it must afford "notice and opportunity for hearing appropriate to the nature of the case" *before* the termination becomes effective.' *Bell* v. *Burson*, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591, 29 L.Ed. 2d 90." 408 U.S. at 570, 92 S. Ct. at 2705 (fn. 7).

An implicit and undeniable corollary to that definition must be that until due process has been satisfied, the interest at stake still exists and has not been constitutionally terminated. The approach of the Court of Appeals in this case, however, allows an extinguishment of those protected property rights *ex post facto* upon an ultimate finding of cause for termination of these rights, at some time, in some manner, by some tribunal. Such an approach clearly negates the protection granted by the Fourteenth Amendment.

The Court of Appeals found that the defendants, by prejudging the merits of plaintiff's termination, made it impossible for them to grant him that fair and impartial hearing to which he is constitutionally entitled. Yet, at the same time, the Court held that "it is inconceivable that even if Plaintiff had been accorded his procedural due process rights he would have been allowed to continue in office." That finding turns constitutional rights upon their head. This approach forces State employees to have the worst of all worlds. In effect, this decision renders the constitutional rights, as declared by this Court, to be meaningless. It deprives a State employee who has been denied a hearing of any and all remedy for the injury which he has suffered. This approach allows State officials to refuse to grant an employee the hearing to

which he is entitled, thereby forcing him to institute suit for the vindication of his rights, and forces him to bear the burden or proving that if a hearing were held he would have prevailed. Should the State prevail upon the issue of termination for cause, it will have lost little, if anything, for having failed to grant the constitutionally required hearing.

As a result of this ruling, the State employee's right to a hearing is illusory. Even if he prevails upon his claim that he should have been granted such a hearing, he will be allowed no real damages for his loss.

To award a State employee damages based upon the salary to which he would have been entitled is not to grant him a windfall, as stated by the Court of Appeals. As made clear by this Court in *Roth* and *Sinderman*, constitutional due process rights exist to protect property interests already held by the employee. He cannot be deprived of those interests *unless* and *until* a hearing has been held. To grant him a continuation of those property rights until such a hearing is held does not grant him a windfall, but simply grants him that which he already has and which the defendants are attempting to take from him. Until the proper procedures are followed by the State, those rights—the rights to salary as under a contract—still exist and cannot be extinguished. Yet, the approach taken by the Court of Appeals here does extinguish those rights *ex post facto* on the ground that if the hearing were held, those rights would have been properly extinguished. Such an approach is anathema to the existence of due process rights. Constitutional rights are not determined upon what would have happened, but upon what has in fact occurred. The employee's loss is fixed by the failure to grant him his

rights. That loss cannot be truncated by a statement that if his due process rights had been granted, he would not have prevailed on the underlying issue.

To accept reasoning such as this would be to disrupt all rights held by citizens of this country. This holding allows a governmental entity to act with impunity, with no fear that it will be required to respond in any substantial damages if it violated an employee's rights.

It is submitted that the approach taken by the Court of Appeals for the Fourth Circuit in *Horton* v. *Orange County Board of Education,* 464 F.2d 536 (1972) is the proper one. There the Court found that had a hearing been held, the Plaintiff school teacher would have been found guilty of insubordination and subject to termination for cause. However, the Court held that since the Board had refused to grant the hearing to which the Plaintiff was constitutionally entitled, "she would be allowed to recover as damages her pecuniary loss by reason of the premature termination, computed for the period between the date she was disemployed and the date of the decision." *Id.* at 538.

The Court of Appeals in this case rejects this standard on the ground that compensation to the plaintiff is wholly fortuitous. Yet that is not truly the case. At all times the defendant Board holds it entirely within its power to grant the constitutionally required hearing. This hearing may be granted at any time. It is only the steadfast refusal to grant the hearing that requires trial before the Court. The amount of recovery, then, does not depend upon the ability of the Court to reach a trial, but upon the willingness of the defendants to live up to their constitutional obligations. The Board may terminate the running of these damages at any time by offering to grant the employee

the constitutionally required hearing. If, at that time, the employee refuses to participate, then, the risk of loss is shifted to him. However, where, as here, the employee has at all times demanded the hearing to which he is entitled, his contractual salary rights must continue until the time that the hearing is held.

When dealing with constitutional rights, the vindication of the one who has been deprived of those rights, cannot be made to rest upon the determination of the underlying nonconstitutional dispute. In the area of criminal law, for example, vindication of the right to be protected from illegal search and seizure does not depend upon the ultimate guilt or innocence of the accused. Where evidence has been illegally seized, that evidence cannot be used against him. So too, in a subsequent civil suit for a deprivation of those rights, the guilt or innocence of the accused is irrelevant in reaching a determination as to whether his rights have been violated. *Kerr* v. *City of Chicago,* 424 F. 2d 1134, 1139 (7th Cir. 1970).

Similarly here, the State employee who has been deprived of his right to a hearing cannot have the ultimate finding that there was cause to discharge him used to deprive him of the pecuniary damages he has suffered until that determination has been made. The termination is not, and cannot constitutionally be effective until he has been granted that hearing. Until that hearing has been held, and cause for termination proven, the property rights still exist. They cannot be extinguished *ex post facto,* upon a decision as to whether there would have been cause to terminate if he had been given that to which he is constitutionally entitled. The fact is, he was not given that to which he was entitled.

To speak in terms of a "windfall at the expense of the taxpayers of the school district", as the Court of Appeals does, is to deny the worth and rights of the individual. That collectivist approach contains the seeds of a most pernicious attitude toward Constitutional rights, which must not be allowed to flower and bear fruit.

II.

FIRST AMENDMENT RIGHTS MAY NOT BE DENIED UNDER THE GUISE THAT IT IS THE MANNER OF THE EXPRESSION RATHER THAN THE CONTENT WHICH IS BEING PUNISHED.

Plaintiff charged in his complaint that one of the reasons given for his termination was that he had written a memorandum discussing proposed changes in the ethnic studies program at Prairie State College. In its first opinion in this case, the Court of Appeals for the Seventh Circuit held that the writing and dissemination of such memorandum could not be a ground for plaintiff's termination, referring to *Pickering* v. *Board of Education*, 391 U.S. 563 (1968):

> ". . . *Pickering* should not be read to authorize the discharge of a college president merely because he expresses an opinion that could be interpreted as a sign of disloyalty or an undermining of the confidence placed in him. Instead, *Pickering* holds that an employee's speech may be regulated only if a public entity can show that its functions are being substantially impeded by the employee's statements."
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> • • •
>
> "Here Dr. Hostrop, because of his background and leadership position as college president, sought to contribute to the discussion of a curriculum issue that would be decided by vote of the Board. To silence

> 'vigorous and robust debate' in the formulation of educational policy on the administrative level would certainly be contrary to the spirit of the *Pickering* decision."

In its second opinion, the Court of Appeals has completely negated the clearly proper holding as set forth above. Indeed, the language of the Court seems to completely ignore what it had said previously. The facts at the trial disclosed that on or about May 25, 1970, Plaintiff, in his position as President of Prairie State College, wrote a confidential memorandum to his administrative cabinet, composed of his closest administrative aides. Among the proposals discussed in this memorandum was the thesis of integrating the heretofore autonomous ethnic studies program with the rest of the college studies, so that Black History would become a part of the history department, Swahili would become a part of the language department, and so on. This confidential memorandum was leaked by someone to the student newspaper and printed on the night of graduation, which was the first time that any of the Board members became aware of its existence. The District Court found that one of the valid reasons for plaintiff's discharge was the timing and concealment of this memorandum from the Board.

This finding referred to the fact that the memorandum, which was clearly marked for discussion purposes only, proposed that these changes might be made within the next few weeks. In affirming the finding of the District Court on this issue, the Court of Appeals stated:

> "The evidence indicates, and the District Court could properly have found, that the board members were disturbed because a memorandum proposing the repudiation of their commitment to continue the ethnic

studies program for another year was withheld from them until the fortuitous leak to the newspapers compelled its disclosure to them, which occurred less than three weeks before the date proposed in the memorandum for effectuation of this highly controversial action; and this 'timing and concealment' rather 'his expression of views' in the memorandum constituted one of the reasons for the board's action. This we think is the meaning of the District Court's finding, which we cannot say is clearly erroneous. These facts do not show a violation of plaintiff's first amendment rights."

This finding completely ignores the undisputed fact that no change could be made in this program by plaintiff, or by anyone else, except the Board itself. This matter would have to have been presented to the Board for any action to take place.

To attempt to avoid the holding of this Court in *Pickering* by such a subterfuge cannot be tolerated. The only meaning which can be attributed to this language is that if plaintiff had himself caused the memorandum in question to be printed, published and distributed about the campus, as well as to the Board members themselves, he could not have been punished for so doing. However, since he attempted to act in a responsible manner by restricting the circulation of this memorandum concerning a controversial program to those with a special right to discuss these ideas before presenting a concrete proposal to the Board, he can thereby be discharged from his position as President.

In effect, this holding states that the manner of disseminating ideas can be used by the State as an excuse to penalize a person whereas the content thereof cannot be so used. That this approach is a repudiation of this Court's holdings regarding freedom of speech is without question. Neither the District Court nor the Court of Appeals has pointed to any facts in this record which would support a finding that the publication of this memorandum, regardless of the manner in which it either was or was not disseminated, materially or substantially interfered with the requirements of appropriate discipline in the operation of the school. *Pickering* v. *Board of Education, supra., Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503, 89 S.Ct. 733 (1969). The fact is that the plaintiff disseminated ideas which the Board thought were not appropriate. This is clearly an impermissible ground for having taken action against him. To say that it was not the statements, but when and how they were stated, which led to the dismissal, is merely another way of saying that the things should not have been said. The adverse action has been taken against the speech, regardless of how one dresses up the justifications.

The decision of the Court of Appeals, while paying lip service to the First Amendment, negates the content of the right of free speech embodied therein. Speech cannot be examined in the abstract, but in the context of the manner of dissemination, and the audience to whom disseminated. To penalize as a result of the manner and the audience is the same as penalizing the speech itself. There is no difference. To attempt to create such a difference is to begin to destroy the right itself.

Academic freedom is a special concern of the First Amendment. *Keyishian* v. *Board of Regents,* 385 U.S. 589, 87 S.Ct. 675 (1967). "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton* v. *Tucker,* 364 U.S. at 487, 81 S.Ct. at 251. The importance of these freedoms does not diminish as one moves up the hierarchical ladder

within a school system from classroom teacher to top-level administrator. Certainly it would be anomalous to hold that a classroom teacher has a greater range of freedom of speech than the chief administrator of the system.

Here, too, the Court of Appeals has promulgated a ruling which holds the pernicious seeds of repression. It flies in the face of the numerous holdings of this Court. Freedom of speech is perhaps the most fragile of rights. It is uniquely subject to being chilled by the threat of punitive action. The holding of the Court of Appeals in this case allows such a threat of punitive action. The door to repression must not be allowed to remain open the merest crack. It must be tightly bolted and barred, lest the most precious, unique, and fragile of our rights be eroded away to nothingness bit by bit.

CONCLUSION

While purporting to protect the constitutional rights of public employees, the decision by the Court below in reality destroys any meaningful content to those rights. Constitutional requirements are not mere formalisms. They protect the basic fabric of our society. They define the relationship between Government and the individual. The opinion below, contrary to other opinions by other Circuits, deprives the individual of any meaningful means of redress when a governmental employee has been denied his rights to due process by his employer. The deck has been stacked against him. Even when he wins he loses.

In enacting 42 U.S.C. §1983, Congress decreed that every citizen whose rights have been denied by the State, is to

receive proper redress for that denial. The decision below turns that mandate into an empty formalism, by denying damages for the taking of property without due process.

Further, the protection of freedom of speech has been side-stepped and evaded in a most unnatural and transparent manner. That most fragile of rights has once again been relegated to a secondary position in deference to the interests of the State. Every such attempt to subordinate the rights of the individual to the interests of the State must be resisted vigilantly.

Wherefore, petitioner prays that this Court's Writ of Certiorari issue and that the judgment below be reversed insofar as it prohibits Petitioner from recovering damages based upon his contractual rights, and that the cause be remanded to the District Court with directions to hold a full hearing on damages suffered by petitioner as a result of the violation of his constitutional rights by defendants.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion Of The United States Court Of Appeals For The Seventh Circuit September 24, 1975

Before FAIRCHILD, *Chief Judge*, SWYGERT and TONE, *Circuit Judges*.

TONE, *Circuit Judge*. Plaintiff, a former president of a public junior college who was discharged by the college board in July, 1970, brought this civil rights action, alleging that he was wrongfully terminated in violation of his federal constitutional rights of free speech and procedural due process and his contract rights. In a bench trial the District Court found the issues in favor of the defendants. We hold that the District Court's findings of fact on the first amendment issue are not clearly erroneous, but that plaintiff's procedural due process right was violated by the failure of the defendants to afford him a hearing and he is therefore entitled to recover damages against the board but not the individual defendants, who are protected by official immunity. We remand for a hearing on damages, which need not be before a jury.

In his amended complaint against the board and its members, plaintiff asserted, in Count I, a claim for the alleged infringements of his rights described above and, in Count II, a claim for conspiracy to deprive him of those rights. The District Court dismissed this complaint for failure to state a claim upon which relief could be granted, but this court reversed that judgment and remanded for trial. *Hostrop v. Board of Junior College Dist. 515*, 471 F.2d 488 (7th Cir. 1972), *cert. denied*, 411

U.S. 967 (1973) (*Hostrop I*). On the eve of trial the District Court allowed further amendment of the complaint to add a Count III, specifically alleging breach of plaintiff's contract rights. The court refused, however, to permit a jury trial of that claim, no jury demand having been filed for the original claims.

I.

First Amendment Rights

Hostrop I held that plaintiff had stated a violation of his first amendment rights by his allegations that the primary reason for his dismissal was his writing of the memorandum on the ethnic studies program described in that opinion. 471 F.2d at 491-494. The District Court found as a fact, however, as follows:

> ". . . I find that Hostrop's dismissal was not motivated by his expression of views in the Ethnic Studies memorandum. I conclude that, as a matter of fact, his termination was fully justified and was the culmination of a series of confrontations and incidents which include . . . the timing and concealment of the Ethnic Studies memorandum [and seven other listed incidents]."

Even if the exercise of a right protected by the first amendment were only one of several reasons for dismissal, the dismissal would be unlawful, so we consider that possible reason without reference to others. As we construe the District Court's findings, however, plaintiff was not dismissed because of his exercise of first amendment rights. The court's phrase, "the timing and concealment of the Ethnic Studies memorandum," read in the light of the evidence, must be taken as referring to the circumstances surrounding the disclosure of the memorandum to the board: Plaintiff initially gave

copies of the memorandum only to his "cabinet," and instructed them not to discuss it with anyone else. Only when he learned that a copy of the memorandum had found its way into the hands of the student newspaper and was to be published the next day did he furnish copies to the board members. The evidence indicates, and the District Court could properly have found, that the board members were disturbed because a memorandum proposing the repudiation of their commitment to continue the ethnic studies program for another year was withheld from them until the fortuitous leak to the newspaper compelled its disclosure to them, which occurred less than three weeks before the date proposed in the memorandum for effectuation of this highly controversial action; and this "timing and concealment" rather "his expression of views" in the memorandum constituted one of the reasons for the board's action. This we think is the meaning of the District Court's finding, which we cannot say is clearly erroneous. These facts do not show a violation of plaintiff's first amendment rights.

II.

Procedural Due Process Right

Liberty Right

This court held in *Hostrop I* that plaintiff had stated a deprivation of liberty under *Board of Regents v. Roth*, 408 U.S. 564 (1972), in his allegation that the board had damaged his reputation by charging him with lack of veracity, 471 F.2d at 494, but the District Court found from the evidence that Hostrop himself had made public the board's charges when it had no intention of doing so. The court held that his standing in the community was therefore not injured by any action of the board, if it

was damaged at all. We agree. Plaintiff's argument that he had to disclose the reasons to quell the rumors which were circulating does not establish that his reputation was injured by board action. Once the board decided to terminate plaintiff, the most it could do to prevent injury to his reputation was maintain silence as to its reasons. See *Shrick v. Thomas*, 486 F.2d 691, 693 (7th Cir. 1973). The board is not responsible for plaintiff's decision that it would be better for his reputation to publish the reasons.

Property Right

Hostrop I also held that plaintiff's complaint alleged facts showing a deprivation of a property right. 471 F.2d at 494. The District Court found, however, that plaintiff had no legitimate claim of entitlement to his job because he had deceived the board members by omitting from the form of renewal contract he submitted to them for approval a clause the earlier contract had contained requiring him to devote full time to his job as president. Defendants assert, as additional reasons that plaintiff does not have such a claim, that plaintiff's contract was void because its term exceeded one year, and that the deletion of the full-time clause prevented the meeting of minds requisite to the making of a contract.

We think plaintiff had a claim of entitlement amounting to a property interest within the meaning of *Board of Regents v. Roth, supra*, 408 U.S. at 577-578, and *Perry v. Sindermann*, 408 U.S. 593, 601-602 (1972); even assuming that, as the District Court found, he deceived defendants by the manner in which he submitted the form for the new contract. Apart from the fact that the earlier contract, covering the period July 1, 1969 to June

30, 1971, would still have been in effect if the new contract had not superseded it, the new contract was at most voidable for fraud, not void. So long as there was a genuine dispute on the issue of fraud, plaintiff had a claim of entitlement that gave him a right to a hearing. The same is true with respect to the issue raised by the contention that there was no meeting of the minds, assuming that issue to be analytically different from the fraud issue.

Defendants' argument that both contracts were void because their terms exceeded one year is also without merit. Even if there were a one-year limitation under Illinois law, a contract would not, we think, be invalid in its entirety but only for the period in excess of one year. But our examination of Illinois law persuades us that the making of a contract for a term in excess of one year was within the authority of the board.

In arguing that both plaintiff's original and superseding two-year contracts were void *ab initio*, defendants rely on Illinois cases holding it beyond the power of a school board to employ teachers for a period beyond a school year, a rule originally based on a construction of the statute, *Stevenson v. School Directors*, 87 Ill. 255, 257-258 (1877), and on the principle that one board should not be able to bind a later board, *id.* at 258-259; *Davis v. School Directors*, 92 Ill. 293, 296 (1879). In the case at bar, the board, prior to the April 1970 board election, purported to extend plaintiff's contract until June 30, 1972, or two years beyond its term. After the mid-April election, the new board did not object to plaintiff's new contract and permitted him, on July 1, 1970, to commence serving under it. This adoption of the contract by the new board meant that plaintiff had a valid contract at least through June 30, 1971. This is so

regardless of whether plaintiff was working under his original (1969-1971) or his superseding (1970-1972) contract.

Moreover, we think that the board was empowered to enter into contracts of a duration of longer than one year. In 1927, the Illinois General Assembly conferred on school boards the power to contract with teachers, principals, and superintendents for a period of three years, after expiration of a two-year probationary period. See *Sloan v. School Directors of District No. 22*, 373 Ill. 511, 26 N.E.2d 846 (1940). In *Sloan* the Illinois Supreme Court determined that the *Stevenson* and *Davis* cases, *supra*, were no longer applicable because "they were decided before the enactment of" the 1927 law. 373 Ill. at 514, 26 N.E.2d at 847. Subsequently the Illinois Supreme Court said of the statute: "The purpose of the General Assembly in enacting the statute is apparent, for it is in the best interest of the schools that competent and capable teachers be continued in their employment. It adds to the stability of the employment and works to the advantages not only of the public but to the teachers and those employed with the administration of school affairs." *Pack v. Sporleder*, 394 Ill. 130, 140, 67 N.E. 2d 198, 203 (1946). The law was later changed to enable school boards, after a probationary period, to contract for "contractual continued service." See Ill. Rev. Stat. ch. 122, § 23-11 (1969).

The tenure statute does not apply to a president of a college, but it was against the background of this statute that the Illinois General Assembly created the Junior College Boards by the Public Junior College Act, Ill.

Rev. Stat. ch. 122, §§ 101-1, *et seq.* (1969).[1] Rather than determining the tenure policy for the junior colleges, as it had done for the public schools, the General Assembly provided that the board itself, which appoints the chief administrative officer, *id.* § 103-26, should "establish tenure policies for the employment of teachers and administrative personnel," *id.* § 103-32. We think that the General Assembly intended, in using this language, not to reinstate for junior colleges the rule of the *Stevenson* and *Davis* cases, but to give the board authority to establish its own policies with respect to tenure, which in its broadest sense includes the limited tenure afforded by a contract calling for a term in excess of one year.

The defendant board has in fact established tenure and employment policies in its Policies and Procedures, paragraphs 4.35, 4.25, and 2.20. Teachers are appointed annually until they receive tenure and then on a continuous basis. Administrative personnel other than the president are appointed subject to the annual recommendation of the college president and approval of the board. The president can be appointed for more than one year:

> "The President of the College is selected by the Governing Board and under whatever terms are mutually agreed upon at the time of appointment. It will be the duty of the Board to renew the contract of the President of the College or to notify him in writing prior to the first of January in the last

[1] Here and elsewhere in this opinion we refer to the 1969 edition of the Illinois Revised Statutes because that edition contained the version of the School Code in force at the time of the events in issue here. The changes reflected in the present law, Ill. Rev. Stat. ch. 122, §§ 101-1, *et seq.* (1973) are not material here. The references to "Junior Colleges" have for the most part been changed to references to "Community Colleges."

year of his incumbency that his services will not be required after the expiration of his present contract.

"The compensation of the President of the College will be fixed by the Board at the time he is appointed. By mutual consent the compensation of the President may be adjusted before the start of any academic year." Policies and Procedures 2.20.

We therefore conclude that under the enabling statute and the board's own rules adopted pursuant to the statute, the board had authority to contract with the president of the college for a period of more than one year.

Denial of Hearing

Our review of the evidence leaves us with the definite and firm conviction that plaintiff was never offered a fair hearing on termination, and that, in fact, the board prejudged his case before making any hearing available to him. There can be no real dispute that before the special session of the board on July 23, 1970, when plaintiff was to be afforded a hearing, the board had already decided to terminate him, and had in fact made a commitment to another person to hire that person as interim president. The board having prejudged the matter of plaintiff's termination before the July 23 meeting, and being no longer therefore "a tribunal possessing apparent impartiality," as required by *Hostrop I*, 471 F.2d at 495, plaintiff did not waive his right to a hearing by absenting himself from that meeting.

The termination of plaintiff's employment without affording him the notice and hearing required by *Board of Regents v. Roth* and *Perry v. Sindermann* is actionable despite the District Court's findings and conclusion,

which we do not disturb, that the conduct of plaintiff was such as to constitute cause under state law for termination of his employment. This is made clear by the last sentence of footnote 15 of *Hostrop I*, where the court recognized that despite the existence of "grounds to break an employment contract," doing so "by violating an employee's due process rights to notice and hearing" is nevertheless actionable. 471 F.2d at 494 n. 15.

III.

The Conspiracy Charge

Plaintiff contends that, as alleged in Count II of his amended complaint, the board members, in addition to violating his civil rights, conspired to do so in violation of 42 U.S.C. § 1983. The District Court, having found no violation of plaintiff's rights, also found against plaintiff on the conspiracy issue.

The doctrine of civil conspiracy extends liability for a tort, here the deprivation of constitutional rights, to persons other than the actual wrongdoer, W. Prosser, *The Law of Torts* § 46 at 293 (4th ed. 1971), but it is the acts causing damage to the plaintiff that give rise to liability for damages, not the conspiracy itself.

> "The damages for which recovery may be had in a civil action is not the conspiracy itself but the injury to the plaintiff produced by specific overt acts. [Citations omitted.] The charge of conspiracy in a civil action is merely the string whereby the plaintiff seeks to tie together those who, acting in concert, may be held responsible for any overt act or acts." *Rutkin v. Reinfeld*, 229 F.2d 248, 252 (2d Cir. 1956), *cert. denied*, 352 U.S. 844 (1956).

As stated in *Jones v. Bales*, 58 F.R.D. 453, 458 (N.D. Ga. 1972), *aff'd*, 480 F.2d 805 (5th Cir. 1973) (per curiam):

> "For a claim under 42 U.S.C. § 1983, a conspiracy is not a vital element. Nevertheless, a conspiracy may be used as the legal mechanism through which to impose liability on each and all the defendants without regard to the person doing the particular act. *Mizell v. North Broward Hosp. Dist.*, 427 F.2d 468, 472-473 (5th Cir. 1970); *Nesmith v. Alford*, 318 F.2d 110, 126 (5th Cir. 1963) [*cert. denied*, 375 U.S. 975 (1964)]."

In the case at bar plaintiff has shown that defendants agreed and acted in concert in denying plaintiff a hearing. Indeed a board is incapable of acting in any other manner. Each defendant, however, is still only liable for the overt act of depriving plaintiff of his property interest without a hearing, which is the same liability that exists under the substantive charge of Count I. The conspiracy count thus adds nothing to the substantive count.

IV.

Relief For Due Process Violation

The Defendant Board

The defendant board, as distinguished from its members, "is a body politic and corporate" which "may sue and be sued in all courts and places where judicial proceedings are had," Ill. Rev. Stat., ch. 122, § 103-11 (1969); that is, it is a municipal corporation, *Norfolk & W. Ry. Co. v. Board of Education*, 114 F.2d 859, 863 (7th Cir. 1940) (relying upon *Board of Education v. Upham*, 357 Ill. 263 191 N.E. 876 (1934)).[2] As such it is not

[2] The board in *Aurora Education Ass'n v. Board of Education*, 490 F.2d 431, 435 (7th Cir. 1973), *cert. denied*, 416 U.S. 985 (1974), which the court said was "not a municipal corporation," was organized under an Illinois statute, now Ill. Rev. Stat., ch. 122, § 10-10 (1973), different from the ones under which the boards in this case and the *Norfolk & Western* case were organized.

amenable to suit under 42 U.S.C. § 1983. *City of Kenosha v. Bruno*, 412 U.S. 507, 513 (1973); *Monroe v. Pape*, 365 U.S. 167, 187-192 (1961); see *Strickland v. Inlow*, 485 F.2d 186, 191 (8tn Cir. 1973), *rev'd on other grounds sub nom. Wood v. Strickland*, ... U.S. ....., 95 S.Ct. 992 (1975). Plaintiff having alternatively invoked 28 U.S.C. § 1331, however, and the requisite jurisdictional amount being concededly present, the board can be sued under that statute.[3] *Calvin v. Conlisk*, ... F.2d ....., No. 74-1289, Slip Op. pp. 10-14 (7th Cir. June 30, 1975); see *City of Kenosha v. Bruno, supra*, 412 U.S. at 514 (1973) (majority opinion) and 412 U.S. at 516 (concurring opinion of Brennan and Marshall, JJ.); see also Bodensteiner, "Federal Court Jurisdiction of Suits Against 'Non-persons' for Deprivation of Constitutional Rights," 8 Val. U. L. Rev. 215, 224-229 (1974). Accordingly, the board is answerable for the violation of plaintiff's procedural due process right.

[3] The eleventh amendment does not affect this suit. Defendant board has not asserted immunity, and has therefore waived this defense. Moreover, the Illinois legislature, by permitting the board to be sued "in all courts" appears to waive any immunity a board would otherwise have. Finally, the eleventh amendment does not extend immunity to political subdivisions of the state. *Lincoln County v. Luning*, 133 U.S. 529 (1890); *Port of Seattle v. Oregon & W. R. Co.*, 255 U.S. 56, 71 (1921); see *Edelman v. Jordan*, 415 U.S. 651, 667 n. 12 (1974). Compare *Brennan v. University of Kansas*, 451 F.2d 1287, 1290 (10th Cir. 1971), which holds a state university immune under the eleventh amendment because under state law it was an agency functioning as an alter ego of the state. (In Illinois, the Board of Trustees of the University of Illinois is treated as "separate and distinct from the State" and is "no part of the State government." *People v. Barrett*, 382 Ill. 321, 343, 46 N.E. 2d 951, 962 (1943).) See also, *Aerojet-General Corporation v. Askew*, 453 F.2d 819, 829-830 (5th Cir. 1971), *cert. denied*, 409 U.S. 892 (1972). Also compare *Hamilton Mfg. Co. v. Trustees of State Colleges in Colorado*, 356 F.2d 599, 601 (10th Cir. 1966), which was an action on a state debt, and *DeLevay v. Richmond County School Board*, 284 F.2d 340 (4th Cir. 1960), which holds a county school board to be an agency of the state immune under the eleventh amendment.

The Defendant Board Members

Shortly before oral argument was held in the case at bar, the Supreme Court handed down its opinion in *Wood v. Strickland, supra*, 95 S.Ct. 992 (1975), which laid down the principles we are bound to apply in determining the individual liability of state officers in the position of the individual defendants here. Although that case dealt with board members' individual responsibility for disciplinary proceedings against students, its discussion of immunity is equally applicable to conduct of board members affecting the rights of teachers and administrators. The Court there held that to be entitled to immunity from individual liability for damages on the ground of good faith for an act violating constitutional rights a board member must meet two tests: First, he must be acting, not "with the malicious intention to cause a deprivation of constitutional rights or other injury to the [plaintiff]," but "sincerely and with a belief that he is doing right." Second, if he meets the first test, he is liable only "if he knew or reasonably should have known" that his act "would violate the constitutional rights" of the plaintiff. *Id.* at 1000-1001.

There is no evidence in the record at bar suggesting that the defendant school board members acted with malicious intent to violate plaintiff's constitutional rights and not sincerely with the belief that they were doing right. The question left after reviewing the facts of record is whether they reasonably should have known that the action they were taking would violate plaintiff's constitutional rights. That question must be answered in the light of the law as it existed in July 1970, when the action was taken. At that time *Pickering v. Board of Education*, 391 U.S. 563, 574-575 (1968), holding that a faculty member could not be dismissed for exercising protected first amendment rights, had been decided, and

the defendant board members were chargeable with knowledge of the principle established by that case. Apart from whether they should have known of the applicability of the principle to one in plaintiff's position, a question we need not decide, *Pickering* is not applicable because the District Court has found, in findings we cannot say are clearly erroneous, that plaintiff was not dismissed for exercising first amendment rights.

The constitutional right violated was plaintiff's procedural due process right to a hearing before termination, and it is the status of the law in 1970 with respect to this right upon which the immunity of the board members turns. The first definitive holding that termination of teachers' property interests in their employment contracts with state institutions required due process hearings was *Board of Regents of State Colleges v. Roth, supra*, 408 U.S. 564, 576-578 (1972). Plaintiff does not argue otherwise. His argument is that the board's own written rules, called "policies," required notice and hearing before termination. The "policies" relied upon, however, did not require a pre-termination hearing under the circumstances of this case and therefore did not put the members of the board on notice that plaintiff was entitled to a hearing, even assuming that knowledge of a rule of the board is to be equated with knowledge of a constitutional principle for present purposes. The first, which concerns non-renewal of the president's contract and requires written notice by January 1 of his final year of a decision not to rehire him, applies to terminations on expiration of a contract, not termination for cause, and therefore did not apply to the situation the board thought it was confronted with in July 1970. The second "policy," entitled "Dismissal of Tenured Staff," requires written notice and a hearing, if

requested, but does not apply to an untenured administrator such as plaintiff.[4] The board's "policies," therefore, afford no support for plaintiff's contention that the board members reasonably should have known he was entitled to a hearing.

We must accept and apply the principle that a school board member is not "charged with predicting the future course of constitutional law," *Wood v. Strickland*, *supra*, 95 S.Ct. at 1001, quoting from *Pierson v. Ray*, 386 U.S. 547, 557 (1967). Since, as the Court stated in *Strickland*, "[a] compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's [or administrator's] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith," 95 S.Ct. at 1001, no compensatory award can be justified by the evidence in the case at bar. See also *Briscoe v. Kusper*, 435 F.2d 1046, 1058 (7th Cir. 1970), in which we said:

> "Although found unconstitutional by this Court, the practices of the Board were nevertheless within the ambit of permissible discretion as it appeared at that time. . . . Under these circumstances, personal liability for damages should not attach, regardless of whether such state action technically contravened the Fourteenth Amendment."

The defendant board members' defense of immunity from liability for money damages must be sustained.

[4] Ill. Rev. Stat. ch. 122, § 103-32 (1969) empowers the board "[t]o establish tenure policies for the employment of teachers and administrative personnel." The policy established by the defendant board (Policies and Procedures 2.00) is, "The President of the College serves at the pleasure of the Board."

Relief

Having determined that the board's denial of a pretermination hearing was an actionable wrong for which it, but not its individual members, is answerable, we turn to the question of the form and measure of appropriate relief.

Five years have elapsed since plaintiff's employment was terminated. His employment contract, even if it had continued in force, would long since have expired. Under these circumstances, injunctive relief would be manifestly inappropriate, *cf. Zimmerer v. Spencer*, 485 F.2d 176, 179 (5th Cir. 1973), and we do not understand plaintiff to contend otherwise. Nor, in view of our other holdings, is there any reason for a declaratory judgment.

Although we conclude that plaintiff is entitled to damages, decision as to the appropriate measure presents problems. The District Court has found, in findings we cannot say are clearly erroneous, that plaintiff was terminated for reasons amounting to just cause. Given the nature of these findings, *viz.*, that certain conduct of plaintiff identified by the District Court "substantially impeded the Board's normal functions, critically impaired the personal working relationship between the parties, and completely destroyed the Board's confidence in Plaintiff's loyalty and abilities," it is inconceivable that even if plaintiff had been accorded his procedural due process rights he would have been allowed to continue in office. We have already pointed out, in holding that the defendant board members are entitled to immunity, that in failing to give plaintiff a notice and hearing they did not act maliciously and, in view of the state of the law in 1970, could not reasonably have been expected to know that they were violating plaintiff's constitutional rights. In view of all these cir-

cumstances, justice would not be served and plaintiff would be given a windfall at the expense of the taxpayers of the school district if we were to hold that he is entitled to the same damages that would be recoverable if the contract had been terminated without just cause, although we recognize that one court has adopted this approach, without, however, much discussion of its reasons, see *Zimmerer v. Spencer, supra*, 485 F.2d at 179. Another court has seen it fit to provide reimbursement up until the time that the constitutional deprivation was adjudicated, see *Horton v. Orange County Bd. of Educ.*, 464 F.2d 536 (4th Cir. 1972), a measure of damages which would render the amount of recovery wholly fortuitous since it would be dependent upon when the District Court could hear the case, and which would encourage dilatory tactics.

The wrong done plaintiff was not the termination of his employment, for that has been determined to have been justified, *cf. Garcia v. Daniel*, 490 F.2d 290 (7th Cir. 1973), but the deprivation of his procedural due process right to notice and a hearing. Plaintiff is entitled to damages for that constitutional violation. Although the amount of damages for such an injury cannot be determined by reference to an objective standard, recovery of non-punitive damages for the deprivation of intangible rights for which no pecuniary loss can be shown are not without precedent. Courts have traditionally assessed such damages for tortious injury. Examples in civil rights litigation include the awarding of damages for the deprivation of voting rights, see *Nixon v. Herndon*, 273 U.S. 536 (1927); see *Wayne v. Venable*, 260 F. 64 (8th Cir. 1919), for the abridgment of equal opportunities to housing, see *Jeanty v. McKey & Poague, Inc.*, 496 F.2d 1119 (7th Cir. 1974); *Seaton v. Sky Realty Co., Inc.*, 491 F.2d 634 (7th Cir. 1974), for illegal

arrests, see *Basista v. Weir*, 340 F.2d 74 (3d Cir. 1965); *Rhoads v. Horvat*, 270 F.Supp. 307 (D. Col. 1967), and for violation of the right against unlawful searches and seizures, see *Sexton v. Gibbs*, 327 F.Supp. 134 (N.D. Tex. 1970), *aff'd*, 446 F.2d 904 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972); *cf. Bell v. Hood*, 327 U.S. 678, 684 (1946). See also *Smith v. Losee*, 485 F.2d 334, 352-353 (10th Cir. 1973) (Doyle, J., dissenting). We think the case at bar presents an analogous damage problem.

The question of damages is an issue of fact which should be decided by the trial court. See *Wayne v. Venable, supra*, 260 F. at 66. It is therefore necessary to remand the case for a determination of the damages fairly attributable to the failure to afford plaintiff the due process hearing to which he was entitled. The civil rights cases just cited indicate that the non-punitive damages to be awarded may be special, in the sense that they are related to the particular mental distress or other injury to the plaintiff, and general, in the sense that the damages are inherent in the nature of the wrong. Thus the factors which the trial court should consider in making its award will include the nature of the constitutional deprivation and the magnitude of the mental distress and humiliation suffered by the plaintiff, as well as any other injury caused as a result of being deprived of federally protected rights, but not, in view of *Alyeska Pipeline Service Co. v. Wilderness Society*, 95 S.Ct. 1612 (1975), attorneys' fees. Under the circumstances, plaintiff should also recover his costs, both in the District Court and in this court.

V.

Contract Rights

Count III, added to the complaint on the eve of trial, asserts a state-law contract claim against the board. Since damages are measured in the same way under that count and Count I, the two counts are alternatives. We therefore need not rule on liability under Count III unless the District Court erred in striking the jury demand filed with that count, in which case plaintiff would be entitled on remand to a jury trial of the issue of damages.

Plaintiff had not made a jury demand in connection with his original or amended complaints, filed in January and April, 1971. On February 4, 1974, the court set the case for trial on April 29 of that year. On February 20, 1974, over three years after the commencement of the action, plaintiff obtained leave to file an amendment, adding Count III, in which he sought damages for breach of contract and demanded a jury trial. Pursuant to defendants' motion, the court struck the amendment with leave to amend within ten days. Plaintiff did not amend within that time but waited until April 29, 1974, the date set for trial, to seek leave to file a new amendment containing the contract claim and a jury demand. The court granted leave to file the amendment but struck the jury demand as untimely, gave defendants 48 hours to answer, and proceeded to trial on May 2, 1974.

The trial judge may well have had discretion under Rule 15(a), Fed. R. Civ. P., to refuse to allow the amendment on the date set for trial except on condition that the jury demand be withdrawn. Compare *Chicago Pneumatic Co. v. Hughes Tool Co.*, 192 F.2d 620, 631 (10th Cir. 1951); *Parissi v. Foley*, 203 F.2d 454, 455-456

(2d Cir. 1953), *rev'd on other grounds sub nom. Parissi v. Telechron, Inc.*, 349 U.S. 46 (1955); and *Bercovici v. Chaplin*, 56 F.Supp. 417, 418 (S.D.N.Y. 1944) with *Alcoa S.S. Co. v. Ryan*, 211 F.2d 576, 578 (2d Cir. 1954); *Local 783, Allied Industrial Wkrs. v. General Electric Co.*, 471 F.2d 751, 755-756 (6th Cir. 1973), *cert. denied*, 414 U.S. 822 (1973); and *cf.* 3 J. Moore, *Federal Practice* ¶ 15.08[4] at 907 (2d ed. 1974); 5 *id.* at ¶ 38.41. Plaintiff had failed to present the amendment within the time allowed by previous order of the court, the case was over three years old and had been set for trial almost three months earlier, and the court had allocated time on a busy calendar for a bench trial, not a jury trial, which would be bound to take longer. The court, however, did not strike the jury demand in the exercise of discretion but on the ground that the demand was untimely under Rule 38, Fed. R. Civ. P., as appears from his explanation of the reason for his action:

> "The rules clearly provide that if a jury demand is not made in writing at the time the complaint is filed, within ten days thereafter, your time to demand a jury—or ten days after you file the answer, why it is too late to file a jury demand."

We can hardly affirm an exercise of discretion that did not occur, and therefore must consider whether plaintiff was otherwise entitled to a jury trial.

The controlling question is whether Count III introduced a new issue into the case. Rule 38(b), Fed. R. Civ. P.; 5 J. Moore, *supra*, ¶ 38.41. We think it did not, although the matter is not free from doubt. The amendment seeking damages for breach of contract under rights created by state law did not, as counsel for plaintiff acknowledged in the trial court, allege new subject matter, "just a different theory of law." The amended complaint, in connection with which no jury demand

was made, alleged the contracts, plaintiff's performance of his obligations thereunder, and the board's termination "in violation of the Plaintiff's contractual rights, and further in violation of his [constitutional] rights." If the amendment here in issue had not been filed, and we were to conclude from the evidence that plaintiff was entitled to prevail on the contract theory but not on the constitutional theory, we could not say the allegations of the existing pleading were insufficient to allow recovery. Under Rule 8(a), Fed. R. Civ. P., the pleader need not allege the legal theory on which he relies, *Siegelman v. Cunard White Star Ltd.*, 221 F.2d 189, 196 (2d Cir. 1955); 2A, J. Moore, *supra*, ¶ 8.14; and under Rule 54(c) of the rules he is to be granted any relief to which he is entitled even though he has not demanded it, 2A Moore, *supra*, ¶ 54.62. The allegations of termination in violation of contract right which appeared in the pleading before amendment were sufficient to raise the breach-of-contract issue, from which it follows that the amendment did not raise a new issue. *Cf. Lanza v. Drexel & Co.*, 479 F.2d 1277, 1310-1311 (2d Cir. 1973) (in banc). Accordingly, the District Court did not err in striking the jury demand.

The case is remanded for a hearing on damages.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

APPENDIX B

Opinion Of The United States District Court For The Northern District Of Illinois, Upon Trial Of The Case, September 23, 1974

AUSTIN, *District Judge.*

MEMORANDUM and JUDGMENT ORDER

On July 23, 1970, Plaintiff Richard Hostrop was discharged as President and chief administrative officer of Prairie State Junior College in Chicago Heights, Illinois. In early 1971, Hostrop brought this lawsuit, seeking monetary, declaratory, and injunctive relief against Defendants, members of No. 515 Junior College Board of Directors. Specifically, Plaintiff maintained that he was unconstitutionally denied a Board hearing before termination. He further contended that his severance resulted solely because of his preparation and circulation of a highly controversial memorandum criticizing a Board-approved Ethnic Studies program and that, consequently, the dismissal was unjustified, a breach of his employment contract, and a violation of his first amendment right to freely speak his opinions.

This matter first came before me in February, 1972, when I dismissed the amended complaint for failure to state a claim upon which relief can be granted. *Hostrop v. Board of Junior College District No. 515*, 337 F.Supp. 977 (N.D. Ill. 1972). Assuming the accuracy of his well-pleaded allegations for purposes of my decision, I found that, due to his high-level administrative position and his intimate working relationship with the Board,

Hostrop could not receive first or fourteenth amendment protection for public statements that were critical of his employer. On appeal, the Seventh Circuit disagreed and, on December 21, 1972, reversed and remanded this action, holding that the amended complaint presented viable contractual and constitutional claims.[1] *Hostrop v. Board of Junior College District No. 515*, 471 F.2d 488 (7th Cir. 1972).

Upon remand, I conducted a seven-day hearing at which the parties submitted evidence and arguments in support of their various contentions. After careful consideration, I conclude that Plaintiff has not proven the essential allegations of his amended complaint and that judgment must be entered for Defendants.

I. *HEARING RIGHTS AND WAIVER*

First, Hostrop has not shown that he merited a pre-termination hearing. On appeal, the Seventh Circuit held that Plaintiff could recover on his due process-denial claim only if he proved that his particular circumstances gave rise to a "liberty" or "property" right warranting constitutional protection. On the basis of the

[1] Plaintiff insists that the appellate court opinion held that his allegations were factually well-founded and actually specified the procedures due him. This argument is spurious and must be rejected. The Circuit decision only discussed Defendants' attack upon the legal sufficiency of Hostrop's claims. Fed. R. Civ. Pro. 12(b)(6). By its carefully-delineated terms, the appellate ruling merely asserted that Plaintiff's amended complaint was actionable. The Court did not—as it properly could not—substantively evaluate these charges. In remanding "for the consideration of the causes of action the Plaintiff has pleaded," the Seventh Circuit remitted this litigation to me for factual findings and legal conclusions and not necessarily, as Hostrop seems to suggest, for the entry of judgment in his favor. 471 F.2d at 495.

evidence before me, he has not demonstrated the existence of either right. Since Hostrop made public the Board's grounds for discharge when it had no intention to do so itself, I find that his "standing in the community" was not damaged by any action of the Board. *See* 471 F.2d at 494. *See also Shirck v. Thomas*, 486 F.2d 691 (7th Cir. 1973); *Jafree v. Scott*, 372 F.Supp. 264, 270 (N.D. Ill. 1974); *Defendants' Post-Trial Memorandum 8-11.* Moreover, because Plaintiff deceptively deleted a material provision of his proposed employment contract and misled Defendants concerning his extensive outside involvements, I further find that he had no reasonable or "legitimate claim of entitlement to his job." 471 F.2d at 494. *See Defendants' Post-Trial Memorandum 11-16.* It follows that, in this instance, due process does not demand a dismissal hearing. *See, generally, Birdwell v. Hazelwood School District*, 491 F.2d 490 (8th Cir. 1974).

Even allowing Hostrop a hearing right, I find that he waived it by refusing to attend the July 23, 1970 Board meeting at which he was discharged. The evidence established that his attendance was required by school rules and policy, that he knew of the pendency and substance of the meeting, that he had ample advance notice of the charges against him, and that he failed to be present on advice of counsel. Moreover, I find that the Board was prepared to undertake an informal impartial hearing into its complaints against him. In this context, Plaintiff's voluntary absence from a properly-noticed Board session constitutes a deliberate waiver of any due process rights he may have possessed. *See, generally, Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Birdwell, supra. See also Defendants' Post-Trial Memorandum 17-29.*

II. *FIRST AMENDMENT AND CONTRACTUAL RIGHTS*

Next, I find that Hostrop's dismissal was not motivated by his expression of views in the Ethnic Studies memorandum. I conclude that, as a matter of fact, his termination was fully justified and was the culmination of a series of confrontations and incidents which include the Savage and Cooke problems, the Perkins and Will affair, the timing and concealment of the Ethnic Studies memorandum, Mrs. Pommer's salary, the operation of the Storefront Academy, his unilateral contract deletion, his misinformation about his non-college activities, and his failure to provide the Board with requested financial reports. These events substantially impeded the Board's normal functions, critically impaired the personal working relationship between the parties, and completely destroyed the Board's confidence in Plaintiff's loyalty and abilities. Hostrop's discharge, therefore, was neither a deprivation of his free speech rights nor a breach of contract. *See Defendants' Post-Trial Memorandum.*

III. *COUNT II CONSPIRACY CHARGE.*

Plaintiff's Count II conspiracy charge is without foundation and unsupported by any persuasive evidence.

IV. *JUDGMENT ORDER*

After weighing all relevant evidence and the contentions of the parties, I find that Plaintiff was not entitled to a pre-dismissal hearing, that he waived any hearing right by failing to attend the July 23, 1970 Board meeting, and that his termination was justified and not the result of an unlawful deprivation of his first amendment privileges.

On the law and facts, judgment must be rendered in favor of Defendants.

Case dismissed.

/s/ JUDGE RICHARD B. AUSTIN
Judge, United States District Court

DATED: September 23, 1974

APPENDIX C

Opinion Of The United States District Court For The Northern District Of Illinois, Dismissing Cause For Failure To State A Claim February 1, 1972

AUSTIN, *District Judge.*

MEMORANDUM OPINION

This is a suit brought pursuant to the first, fourth, fifth, and fourteenth amendments to the United States Constitution and 42 U.S.C. 1981 et. seq. Plaintiff is a former chief administrative officer of Prairie State College and defendants are members of the board of the college district, who terminated plaintiff's employment. They are sued individually and as a corporate body.

Before the court is defendants' motion for summary judgment, which the court believes should be considered more properly as a motion to dismiss for failure to state a claim upon which relief can be granted. Filed with the court are plaintiff's amended complaint (a prior motion to dismiss having been granted), defendants' motion, two affidavits on behalf of the defendants, and memoranda submitted by both sides. In their memoranda both sides refer to depositions, but none have been submitted to this court.

In his complaint plaintiff alleges that he was fired because of an administrative staff memorandum in which he made recommendations for changes in the Ethnic Studies Program. The memorandum was intended to be confidential, but it is alleged that it was made public by someone other than plaintiff. He contends that

his first amendment rights were violated since he was fired solely because of his memorandum and that his fifth and fourteenth amendment rights were violated because he was not given a hearing. This court finds that as a matter of law plaintiff has raised no constitutional claims and therefore the complaint is dismissed for failure to state a claim.

The most recent Supreme Court case concerning the first amendment rights of public school employees is *Pickering v. Board of Education*, 391 U.S. 563 (1968). In that case plaintiff, a high school teacher, sued the board after he was fired for sending to a local newspaper a letter that was critical of the way in which the school board and the superintendent handled proposals to raise revenue. The Court held that unless he knowingly or recklessly made false statements, a teacher could not be dismissed from public employment as a result of his speaking on issues of public importance. The Court noted, however, that factors not present in that case could result in a different finding:

> The statements [made by plaintiff] are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning.

Id. at 569-70

* * *

> It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined.

Id. at 570 n.3.

While none of the parties nor this court have found a case as the instant one involving a school administrator rather than a teacher, if the above-quoted exception drawn by the Supreme Court is to have any application, this court believes it must be in a case such as the one now before it.

According to the employment contract between plaintiff and defendant board, plaintiff agreed to "abide by all rules, regulations and directions issued by the Board in carrying out the duties of his position . . ." as chief administrative officer of the college. The nature of the position of a college president is such that the board must have the "confidence" in and the "personal loyalty" of the president. In order for the working relationship between them to be effective the right of a president to make public statements or to disagree with the board may have to be limited. Therefore, assuming that the memorandum which became public was the basis for

plaintiff being fired,[1] this court finds that this is the type of case envisioned by the Court when it drew the exception in *Pickering* and that the plaintiff thus has no first amendment rights that were violated.

This court further finds that plaintiff has raised no due process rights that would entitle him to notice of charges and a hearing at which he could rebut them. The Supreme Court has held that interests must be considered to decide what due process rights an individual has:

> [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.

Cafeteria & Restaurant Workers v. McElroy, 367 U.S 886, 895 (1961). In that case the Court held that a cook at a cafeteria operated by a private concessionaire in a military gun factory could be excluded from the factory for reasons of security without being given a hearing. The Court noted that it "has consistently recognized that an interest closely analagous to [petitioner's], the interest of a government employee in retaining his job, can be summarily denied." *Id.* at 896.

Thus, in light of *Cafeteria Workers* this court must undertake a balancing of interests to decide what, if any,

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[1] It is not necessary to decide whether the memorandum in question was distributed privately or publicly and if publicly, whether it was done by plaintiff or someone else. If it was public it falls within the exception established in *Pickering*, and if private, the first amendment is not drawn into question, and moreover, the state can limit private debate where it is detrimental to the functioning of a public body. See *e.g.*, *Lefcourt v. Legal Aid Society*, 312 F. Supp. 1105, 1113 (S.D.N.Y. 1970).

procedural due process rights may be guaranteed to plaintiff by the United States Constitution. Since, as mentioned above, no case involving a school administrator has been found by the parties, they have cited to this court cases involving non-tenured teachers.

Both parties have argued that the recent case of *Roth v. Board of Regents*, 446 F. 2d 806 (7th Cir. 1971), *affirming* 310 F. Supp. 972 (W.D. Wis. 1970), *cert. granted*, 40 U.S.L.W. 3194 (U.S. Oct. 26, 1971) (No. 71-162) supports their positions. In *Roth* plaintiff was a non-tenured assistant professor at a state university. After being informed that his one year contract would not be renewed, he sued, alleging that he was not offered another contract because of his expressions of opinion allegedly protected by the first and fourteenth amendments. In deciding whether plaintiff had any due process rights the trial court undertook the balancing test enunciated in *Cafeteria Workers*. While noting that a university should have "considerable latitude" in deciding whether a probationary teacher should remain and that it should have "available a very wide spectrum of reasons, some subtle and difficult to articulate and to demonstrate, for deciding not to retain a newcomer . . .," the court found in favor of the plaintiff. The court stated that the university had no interest in a regime which made a decision wholly without support in fact. The interest of the plaintiff in jeopardy was his academic career. The court found that the balancing test compelled the conclusion that under the due process clause the decision not to retain a state university non-tenured professor may not rest on a basis wholly unsupported in fact or on a basis wholly without reason. 310 F. Supp. at 978-79. The university was ordered to give reasons why plaintiff was not retained and to give plaintiff a hearing at which he could respond to those reasons.

The Court of Appeals affirmed, 446 F. 2d 806, 809 (7th Cir. 1971) holding that

> the district court properly considered the substantial adverse effect non-retention is likely to have upon the career interests of an individual professor and concluded, after balancing it against the governmental interest in unembarrassed exercise of discretion in pruning a faculty, that affording the professor a glimpse at the reasons and a minimal opportunity to test them is an appropriate protection.

The court acknowledged that other circuits have declined to recognize such rights,[2] but went on to point out that the Supreme Court has emphasized the importance of vigilant protection of constitutional freedoms in the academic community, citing *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

This court does not think that there need be the same "vigilant protection" when an administrator is involved as may be necessary when a teacher is. The need for teachers to have freedom in what they teach arises from the very heart of the first amendment. The workshop of the administrator, however, is not the classroom but the office and the conference room. His primary duties are to coordinate, delegate, and regulate, not to educate. The fact that he is the "executive officer *of the board* . . ." Ill. Rev. Stat. ch. 122, § 103-26 (Supp. 1972) (emphasis add-

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[2] 446 F. 2d at 809. The circuits are divided on the question. In *Orr v. Trinter*, 444 F. 2d 128 (6th Cir. 1971), the court used the balancing test and concluded that a non-tenured teacher had no due process rights because of the board's interest in free and independent action with respect to his employment. The Fifth Circuit, however, found that a non-tenured teacher must be given a hearing if he requests it. *Sindermann v. Perry*, 430 F. 2d 939 (5th Cir. 1970), *cert. granted*, 403 U.S. 917 (1971) (No. 952).

ed illustrates the need for, and in fact the intention of the legislature for, a close working relationship between him and the board. The public retains control of the school system by electing the board, Ill. Rev. Stat. ch. 122, § 103-7 (Supp. 1972), which in turn must manage and govern the college. Ill. Rev. Stat. ch. 122, § 103-25 (Supp. 1972). It does this through the chief administrative officer.

Thus, the considerations before this court are not the same as those before the courts in *Roth*. It is true that, as with *Roth*, the plaintiff's career may be harmed by his dismissal. The court acknowledges that if the dismissal was for reasons that had no factual basis, the college community as a whole is harmed by a reduction in respect for the board and other administrators and perhaps by a loss of good teachers as a result. Against these considerations, however, is the fact that the policies of the board, a publicly elected body, are carried out through the chief administrative officer. The board must therefore have wide discretion in deciding whether to hire or fire a person who will be or has been in essence its agent. The discretion, naturally, is not unlimited, but Illinois law prohibits the most obvious forms of constitutionally prohibited discrimination: that based on sex, race, color, creed or national origin. Ill. Rev. Stat. ch. 122, § 103-26 (Supp. 1972).

Just as the Supreme Court has recognized that the first amendment may have restricted application where "close working relationships" are involved (*Pickering*, 391 U.S. at 569-70), so also this court believes that the due process clause of the fourteenth amendment must be limited in application to those types of relationships in public employment.

This court finds that this plaintiff has no first amendment or due process rights which have been violated in regard to his public employment. The complaint is dismissed for failure to state a claim upon which relief can be granted.

/s/ R. B. Austin
Judge, United States District Court

DATED: February 1, 1972

APPENDIX D

Opinion Of The United States Court Of Appeals For The Seventh Circuit December 21, 1972 471 F.2d 488

Before SWYGERT, *Chief Judge*, CASTLE, *Senior Circuit Judge*, and PELL, *Circuit Judge*.

CASTLE, *Senior Circuit Judge*. Appellant Richard W. Hostrop appeals the action of the district court dismissing his civil rights complaint against the Board of Junior College District No. 515 and its members for failure to state a claim upon which relief can be granted. The basic question on this appeal is whether the rights of free expression and procedural due process traditionally given to teachers and other public employees extend also to a college president who was hired to act as the direct agent of a school board.

Plaintiff Hostrop's complaint alleged the following facts, which we shall take as true for the purposes of this appeal. Hostrop was appointed President and chief administrative officer of Prairie State Junior College in Chicago Heights, Illinois by the defendants through a series of contracts which extended his tenure until June 30, 1972.[1] On May 25, 1970, as part of his official duties, plaintiff prepared a confidential memorandum for circulation among his administrative staff which requested that the staff consider certain proposed changes in the college's ethnic studies program for discussion at the

[1] Defendants challenged the validity of the contracts executed by the Board and Hostrop in their memorandum filed with the district court, but this issue was not resolved.

next staff meeting. After an unknown person made a copy of this memorandum public, certain defendants questioned Hostrop's right to make such a proposal and told him that it was a breach of his administrative duties and was not a matter of free expression. On July 13, 1970, plaintiff was summoned to the office of counsel which the Board had recently hired and told that he had the choice of resigning or taking the consequences of being fired. The publication of the memorandum was mentioned as being a prime reason for Hostrop's termination, although he was told that he would be fired without any notification of the charges against him. Ten days later the Board met and terminated Hostrop's contract without giving him any hearing or opportunity to speak in his defense. A list of charges that supposedly justified his termination was given to Hostrop some time later.[2]

Plaintiff's complaint concluded that the alleged facts showed a deprivation of his right to free speech and a denial of due process of law, and asked that the court order the college to give him a full and complete hearing, enjoin the defendants from replacing him with another person as president, and declare that his dismissal violated his first amendment rights. A second count of the complaint alleged the same facts as the first count plus the facts that the defendants had violated the Illinois antisecrecy statute and that the plaintiff had suf-

[2] This belated submission of the reasons for dismissal listed such things as the failure of Hostrop to devote full time to his duties, his withholding of information from the Board, his failure to give attention to certain college problems, and his attempt to mislead the Board during the negotiations for the extension of his contract. Preparation of the ethnic studies memorandum was not specifically mentioned as a reason for dismissal, although one charge stated that "Hostrop failed adequately and competently to deal with the administration of the Black Studies Program, causing both the students at the college and the Board grave concern."

fered both mental strain and financial loss because of the defendants' conduct. This count asked for recovery of actual damages of $100,000 and punitive damages of $500,000.

The district court dismissed the complaint for failure to state a claim upon which relief can be granted,[3] *Hostrop v. Board of Junior College District No. 515*, 337 F. Supp. 977 (N.D. Ill. 1972), finding that Hostrop's position as a college president directly responsible to the Board required that he be loyal to the Board and maintain its confidence in him as conditions of his continued employment. Reasoning from a remark in *Pickering v. Board of Education*, 391 U.S. 563 (1968), that first amendment rights of persons in personal and intimate working relationships with their superiors may be restricted, the court found that Dr. Hostrop's position *vis-a-vis* the Board required that his right to make public statements or to disagree with the Board be limited. 337 F. Supp. at 978-79. Applying the test of *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961), to balance the interests of the Board against those of Dr. Hostrop, the court found that the need of the Board to have wide discretion in deciding to fire its presidents without asserting reasons outweighed any need of the plaintiff to know the reasons for his dismissal and any harm to his professional career. 337 F. Supp. at 980.

[3] The record shows that defendants moved for summary judgment on May 7, 1971. The deposition of Dr. Hostrop was filed with the clerk of the district court on June 1, 1971, and supporting affidavits and exhibits were filed in July and October. The district court treated the defendants' motion as a motion to dismiss in its opinion dated February 1, 1972, stating that no deposition had been filed. We have not considered the contents of the deposition for the purpose of disposing of this appeal, since it was never considered by the district court.

Initially, we note that the disposition of a motion to dismiss for failure to state a claim in a case such as this one is an extremely difficult task. As the district court recognized, resolution of the issues requires an analysis of the working relationship between Dr. Hostrop and the Board and a balancing of the various competing interests of each. Unfortunately, the record at this state of the litigation does not clearly define the working relationship between the parties. It does not indicate how closely Hostrop had to follow the dictates of the Board—how often he met with the Board, how much power he had to formulate educational policy with the Board's blanket approval, or whether he had any ability to debate Board members on certain issues that would be decided by a vote of the Board. A consideration of these factors would indicate more clearly whether Hostrop's right to make his recommendations or to disagree with the Board had to be limited, as the district court asserted, "[i]n order for the working relationship between them to be effective." Similarly, the record does not identify the nature of the competing interests or the extent to which they are irreconcilable—how a hearing procedure would interfere with the discretion of the Board in hiring and firing personnel, whether other administrators were granted hearings before action was taken against them, and what the effects of the hearings given others actually were. With these shortcomings in the record in mind, we turn to the allegations of the complaint.

I. Preparation of the Memorandum As a Ground for Discharge

Plaintiff argues on this appeal that the protections that have traditionally been given to the speech and

associations of academicians[4] should extend also to his circulation of the ethnic studies memorandum. It is true that the judiciary has steadfastly construed the concept of freedom of expression broadly as a means of prompting vigorous, robust debate,[5] and that it has consistently rejected attempts to formulate absolute rules which would restrict the first amendment rights of whole classes of individuals, whether they be students,[6] campus speakers,[7] school newspaper editors,[8] student organizers,[9] or teachers.[10] Against this commitment to academic freedom, defendants are asking this court to excise a class of academic personnel who will have no first amendment rights.

Defendants argue that college administrators like Dr. Hostrop can be discharged whenever they circulate proposals that might offend the sensibilities of the Boards that hired them, for their jobs require that they do not offend the Boards. Defendants rely upon language from *Pickering v. Board of Education*, 391 U.S. 563 (1968), to differentiate between teachers and

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[4] *Healy v. James*, 408 U.S. 169, 180-81 (1972), *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J. concurring).

[5] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), *Donahue v. Staunton*, ... F.2d ..... (7th Cir.) (Slip Opinion No. 71-1160, July 6, 1972 at 10), *Kiiskila v. Nichols*, 433 F.2d 745, 748 (7th Cir. 1970).

[6] *Tinker v. Des Moines School District*, 393 U.S. 503, 513 (1969), *Breen v. Kahl*, 419 F.2d 1034, 1036-37 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970).

[7] *Brooks v. Auburn University*, 412 F.2d 1171, 1172 (5th Cir. 1969).

[8] *Scoville v. Board of Education*, 425 F.2d 10, 13 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970).

[9] *Healy v. James*, 408 U.S. 169, 186 (1972).

[10] *Pickering v. Board of Education*, 391 U.S. 563, 574 (1968), *McLaughlin v. Tilendis*, 398 F.2d 287, 288-89 (7th Cir. 1968).

administrators, one class which may dissipate the confidence of the school board by making certain statements, and one class which cannot afford to:

> The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. . . . Appellant's employment relationships with the Board, and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning.
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> It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined. We intimate no views as to how we would resolve any specific instances of such situations, but merely note that significantly different considerations would be involved in such cases.

Id. at 569-70, 570 n.3. Defendants submit that personal loyalty and confidence are necessary for the proper functioning of the working relationship between Dr. Hostrop and themselves, and that since the circulation of the ethnic studies memorandum could have arguably affected this loyalty and confidence, Hostrop can be discharged.

We do not interpret the above-quoted remarks from *Pickering* so as to support defendants' position on this appeal, especially when that case is placed within the context of other first amendment decisions. It has been consistently held that a government cannot punish a person for his speech alone, but only for speech that causes substantial disruption or that hinders the functioning of the state.[11] In this perspective, *Pickering* should not be read to authorize the discharge of a college president merely because he expresses an opinion that could be interpreted as a sign of disloyalty or an undermining of the confidence placed in him. Instead, *Pickering* holds that an employee's speech may be regulated only if a public entity can show that its functions are being substantially impeded by the employee's statements. *Donahue v. Staunton*, ... F.2d ....., (7th Cir.) (Slip Opinion No. 71-1160, July 6, 1972 at 14) (Swygert, C.J. dissenting). We find that Dr. Hostrop's suggestions about the ethnic studies program which appear in the complaint cannot, on their face and by themselves, be taken as a serious impairment of the effectiveness of the working relationship between him and the Board that the defendants could discharge him merely for making the

[11] *Grayned v. City of Rockford*, 408 U.S. 104, 118 (1972), *Cohen v. California*, 403 U.S. 15, 23 (1971), *Tinker v. Des Moines School District*, 393 U.S. 503, 513-14 (1969), *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

suggestions.[12] Absent actual proof of such an impairment, the face of the pleadings shows no reasons to deny Dr. Hostrop's first amendment rights. It was therefore error to dismiss his complaint for failure to state a cause of action on first amendment grounds.[13]

In fact, the general guidelines drawn by *Pickering* for deciding whether an employee's speech should be restricted support Dr. Hostrop's first amendment right to propose changes in the curriculum of Prairie State

[12] An important distinction between *Pickering* and the instant case is that teacher Pickering engaged in criticism of the school board and that Dr. Hostrop merely made a suggestion for a change in curriculum. It is unclear from *Pickering* whether the Supreme Court thought that criticism of a superior by an employee in a close working relationship with him would be analogous to the speaking of "fighting words" so that the state could discharge the employee merely because he spoke the words of criticism, or whether the state would have to prove that the working relationship between the two had deteriorated because of the criticism so that the two could no longer work effectively together.

In both *Lefecourt v. Legal Aid Society*, 312 F. Supp. 1105 (S.D.N.Y. 1970), *aff'd*, 445 F.2d 1150 (2d Cir. 1971), and *Watts v. Seward School Board*, 454 P.2d 732 (Alas. 1969), *cert. denied*, 397 U.S. 921 (1970), employees were discharged for a series of confrontations and incidents which cumulatively destroyed the efficiency of the governmental units for which the employees worked. Furthermore, in both cases the action of the government employer in discharging the employees was upheld only after a trial court heard evidence relating to the kind of criticism involved and its actual effects.

[13] The district court did not decide whether the memorandum was distributed publicly or privately, but thought this issue was important because of its view that the first amendment does not protect private communications. This point was not argued on appeal. Past decisions have extended the first amendment to protect private statements made by public employees, *Muller v. Conlisk*, 429 F.2d 901 (7th Cir. 1970), *Swaaley v. United States*, 376 F.2d 857, 863 (Ct. Cl. 1967), and statements made by public employees in carrying out their assigned duties. *Downs v. Conway School District*, 328 F. Supp. 338 (E.D.Ark. 1971), *Maillioux v. Kiley*, 323 F. Supp. 1387, 1392 (D.Mass.), *aff'd*, 448 F. 2d 1242 (1st Cir. 1971).

Junior College. *Pickering* recognizes that the position of the person seeking to express his views and the nature of the controversy to which he is directing his comments are important factors to consider in determining whether his freedom of expression should be protected. 391 U.S. at 571-72. The Court recognized that teachers, because of their position in the educational system, are able to make significant contributions to the public debate concerning the allocation of educational funds that precedes public votes. Here Dr. Hostrop, because of his background and leadership position as college president, sought to contribute to the discussion of a curriculum issue that would be decided by vote of the Board. To silence "vigorous and robust debate" in the formulation of educational policy on the administrative level would certainly be contrary to the spirit of the *Pickering* decision.[14]

Plaintiff's allegation that he was discharged merely for circulating the memorandum entitles him to relief under another legal theory distinct from his assertion of his right to freedom of expression. Plaintiff alleged that he circulated the memorandum as part of his official duties, and that it was only several days after it had become public that the members of the Board told him that he had no right to express his views in such a way and that he would be terminated because of this expression. These facts clearly show arbitrary action on the part of the defendants which the due process clause was meant to prevent. Plaintiff, as a public employee, is en-

[14] We recognize that defendants may demonstrate at trial that Dr. Hostrop's circulation of the memorandum was evidence of insubordination and actually produced the harmful effects which the *Pickering* decision indicated may be grounds for discharge.
Such evidence could justify the discharge.

titled to be protected from retaliation for actions which he had every reason to believe were a part of his assigned duties. The facts alleged in his complaint indicate that he has a cause of action resulting from the deprivation of substantive due process. *Conway v. DuPont School District*, 333 F. Supp. 1217, 1220 (D.Del. 1971). *cf. Downs v. Conway School District*, 328 F. Supp. 338, 348-49 (E.D. Ark. 1971), *Mailloux v. Kiley*, 323 F. Supp. 1387, 1392 (D.Mass.), *aff'd*, 448 F.2d 1242 (1st Cir. 1971).

II. Denial of a Pre-Discharge Hearing

The threshold inquiry in determining whether a complaint states a cause of action based on the denial of procedural due process is whether the plaintiff has shown that the state has infringed upon a personal interest protected by the fourteenth amendment—either life, liberty, or property. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), *Lipp v. Board of Education*, ... F.2d ....., (7th Cir.) (Slip Opinion No. 71-1912, November 27, 1972 at 4 n.3). If the complaint does assert the deprivation of a protected interest, due process of law requires that certain procedural safeguards be extended before the state can extinguish that interest. Defendants argue that plaintiff has asserted no interests worthy of due process protection. They also argue that they should have unfettered discretion to hire and fire presidents as a means of expediently carrying out their statutory duties, and that this necessity outweighs any interest of the plaintiff in receiving any kind of hearing before his termination.

We find that plaintiff's complaint alleges at least two protected interests which the defendants have infringed upon, and that plaintiff was entitled to some form of

hearing before his discharge. Plaintiff's complaint makes a credible showing of a deprivation of "liberty" as it is defined in *Board of Regents v. Roth*, 408 U.S. at 573. A person is deprived of "liberty" if the state damages his standing in the community by charging him with an unsavory character trait such as dishonesty or immorality. Plaintiff's complaint alleges facts showing an attack by defendants on his veracity, for the list of charges which the defendants submitted to justify his dismissal accused him of misrepresentations, supplying false information, and withholding important information. In such a case, due process must provide notice and an opportunity to refute such charges. *Id.* Plaintiff's complaint also alleges facts showing a deprivation of "property" as it is defined in *Roth*, *Id.* at 576-78. A person is deprived of property if the government extinguishes his legitimate claim of entitlement to his job. The complaint alleges that Dr. Hostrop had a legitimate claim of entitlement to the position of President of Prairie State Junior College at the time he was discharged on July 23, 1970, for defendants had agreed to employ him until June 30, 1972 under the terms of a series of employment contracts. A term of employment set by contract has been recognized as a property interest which the state cannot extinguish without conforming to the dictates of procedural due process. *Perry v. Sindermann*, 408 U.S. 593, 601 (1972), *Board of Regents v. Roth*, 408 U.S. at 576-77. The existence of such a contractually-established property interest obligates the Board to grant plaintiff a hearing

where he can be fully informed of the reasons for his nonretention and challenge their sufficiency.[15]

Having found that plaintiff has asserted protected interests that are entitled to due process procedural safeguards, we must balance the interests of the state against those of the individual to determine the form of hearing that Dr. Hostrop is entitled to before his termination. *Board of Regents v. Roth*, 408 U.S. at 570. The Board's interest consists of maintaining efficiency through the prompt removal of its chief administrator when it reasonably believes that it can no longer work effectively with and through that person. But it is questionable whether efficiency is a compelling interest,[16] so that this consideration should work to deny a hearing for one college president when courts have rejected it as a rationale for denying hearings to thousands of other employees. *See, Perry v. Sindermann*, 408 U.S. 593 (1972), *Kennedy v. Sanchez*, ... F. Supp. ..... (N.D.

[15] The fact that plaintiff relies upon his employment contract to establish a property interest worthy of protection through the due process clause does not mean that his only remedy is a contract action in state court. A civil rights action based on the deprivation of due process and a contract action to recover damages for a breach are independent remedies. The civil rights action based on deprivation of a property interest established by contract seeks vindication for the arbitrary manner in which the contract was breached. A "garden variety" contract action seeks damages only for the losses caused by the breach once it has occurred in any manner whatsoever. There will be occasions when one action will lie but the other will not, as when the state has grounds to break an employment contract, but does so by violating an employee's due process rights to notice and a hearing.

[16] "The price which a government must pay to protect the constitutional liberties of its employees is some loss of the efficiency enjoyed by private employers; the Supreme Court has repeatedly decided that the value of those individual liberties is well worth the cost." *Illinois State Employees Union, Council 34 v. Lewis*, ... F.2d ..... (7th Cir.) (Slip Opinion No. 71-1619, September 18, 1972 at 19).

Ill.) (Opinion No. 72 C 771, October 24, 1972). Dr. Hostrop's interests lie in protecting his first amendment rights and future employment prospects and in avoiding dismissal when it is not justified by the facts. We find that the resolution of these interests requires that plaintiff be given a notice of the charges against him, notice of the evidence upon which the charges will be based, a hearing before a tribunal possessing apparent impartiality, and a chance to present witnesses and confront adverse evidence at the hearing. *Board of Regents v. Roth*, 408 U.S. at 570 n.7, *Ferguson v. Thomas*, 430 F. 2d 852, 856 (5th Cir. 1970), *Kennedy v. Sanchez*, ... F. Supp. ..... (N.D. Ill.) (Opinion No. 72 C 771, October 24, 1972 at 6.) *See also, Lucas v. Wisconsin Electric Power Company*, 466 F.2d 638, 652 n.30 (7th Cir. 1972). We recognize that there are differences between college administrators and teachers so that the Board may have different justifiable grounds for dismissing its president. A court that may be called upon to review the findings of an administrative hearing which results in the discharge of a college president will have to take the particular duties of the president and his working relationship with the school board into account.

We find that the plaintiff has stated valid causes of action showing that he was deprived of his first amendment right to free expression and his fourteenth amendment right to due process of law. Accordingly, we remand this case to the district court for the consideration of the causes of action the plaintiff has pleaded.

REVERSED.

A true Copy:

Teste: ----------

Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX E

Order Of The United States Court Of Appeals For The Seventh Circuit, Denying Petitions For Rehearing October 30, 1975

On consideration of the petitions for rehearing and suggestion that it be reheard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petitions for a rehearing in the above-entitled cause be, and the same are hereby, DENIED.